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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. WALLACE EARL ROGERS, Defendant and Appellant.	C036059 (Super. Ct. Nos. C000019, 98087)

Defendant Wallace E. Rogers appeals his commitment under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code, §§ 6600, et. seq.)[1] He contends there was insufficient evidence that the underlying offenses were "predatory" and insufficient evidence that he was currently likely to reoffend. We shall affirm.

STATEMENT OF FACTS

Defendant began sexually molesting his children in 1975. The acts of molestation included forcible sexual intercourse,

[1] Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

digital penetration, masturbation, and mutual oral copulation. His daughter was then 8 years old and his son was 10.

In 1978, defendant was arrested for oral copulation and incest with his daughter. He was convicted of immoral acts in the presence of a child. (Pen. Code, § 273g.) Three months later, he was again arrested for immoral acts with his daughter.

In 1984, defendant was convicted of five counts of oral copulation with a minor (Pen. Code, § 288a, subd. (b)(2)) and sentenced to four years in state prison. The victims in this case were his daughter, his son, and a neighborhood child.

In May 1987, defendant was discharged from parole. He moved in with his friend Cynthia H. and her three children, ages 13, 11 and 10. Cynthia's 10-year-old daughter was developmentally disabled. Two months after his parole discharge, he molested Cynthia's 11-year-old son.

Throughout 1987, defendant repeatedly molested Cynthia's 11-year-old son and 10-year-old daughter, including numerous incidents of fondling and digital penetration. These repeated molestations resulted in two separate cases being brought against defendant, one in 1988 and one in 1991.

In June 1988, defendant pleaded no contest to committing a lewd or lascivious act upon a child under the age of 14. (Pen. Code, § 288a.) He was sentenced to six years in state prison, with a five year consecutive term for a prior conviction enhancement.

In July 1991, following a court trial, defendant was convicted of one count of a forcible lewd act upon a child (Pen.

Code, § 288, subd. (b)). The court sentenced him to the upper term of eight years.[2]

In an April 1995 psychological evaluation defendant was diagnosed with "Pedophilia, sexually attracted to females, nonexclusive type; and Personality Disorder NOS."

In 1996, defendant's parole was revoked when he admitted fondling a nine-year-old girl.

On August 4, 1998, the District Attorney filed a petition seeking to commit defendant as a sexually violent predator under the SVPA. This petition was properly supported by two psychiatric evaluations. On August 20, 1998, the court found probable cause to believe defendant was likely to engage in sexually violent predatory criminal behavior upon his release, and ordered defendant to remain in Butte County Jail until trial on the petition. A probable cause hearing was held on October 8, 1998, at which the evaluating psychiatrists, Drs. Korpi and Hupka, testified. The court affirmed its original finding of probable cause and ordered defendant continue to be held at Butte County Jail pending trial on the petition.

For reasons not entirely clear from the record, the commitment trial was repeatedly continued. Ultimately, trial was held on May 18, 2000. Defendant remained in custody at

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[2] The court also reimposed the 11-year sentence from the 1988 plea as the principal term. The 1991 conviction then being the subordinate term, the court stayed execution of all but one-third of the mid-term. This resulted in an additional two-year consecutive term being added to defendant's 11-year term.

Butte County Jail during the period between the probable cause determination and the commitment trial.

Dr. Korpi testified at the commitment trial. For his evaluation of defendant, Korpi reviewed the Department of Corrections' Medical and Central files, conducted a clinical interview, mental status examination, and administered the Rorschach Ink Blot test, a RRASOR scale, and the HARE psychopathy checklist. Based on this information, Korpi diagnosed defendant with pedophilia. He reached this diagnosis based primarily on defendant's arrest record.

At trial, Dr. Korpi confirmed his diagnosis that defendant suffers from pedophilia and his conclusion that this disorder makes it likely defendant will reoffend. With respect to the likelihood of reoffense, Korpi relied on a number of predictors. He noted that there were factors in defendant's favor, such as beginning the behavior later in life, no indications of psychopathy and leading a fairly stable life, including a 23-year marriage. However, Korpi also noted a number of factors that put defendant at a higher risk of reoffending. These factors included that defendant had both male and female victims, two failed out-patient treatment attempts, multiple terms of incarceration and attempts at treatment had not stopped the behavior, and, that defendant denies he has a problem.

On cross-examination, Dr. Korpi admitted some of the deficiencies in the various testing methods available to predict the likelihood of reoffense. He also testified that some of the research and tests he had previously administered had been

improved. Specifically, the RRASOR test had been replaced with the Static 99. Dr. Korpi utilized the Static 99 test shortly before trial and this test indicated a lower likelihood defendant would reoffend, from 73 percent over 10 years to 52 percent over 15 years. Despite the decrease in this percentage, Dr. Korpi remained constant in his opinion that as a result of defendant's pedophilia, "today" defendant is likely to reoffend.

Dr. Hupka also testified at the commitment trial. Dr. Hupka reviewed a number of defendant's records relating to his prior offense pattern, and previous psychiatric evaluations. He administered the HARE psychopathy checklist and a RRASOR scale. He also conducted an hour and one-half interview with defendant. Hupka diagnosed defendant with "[p]edophilia, nonexclusive type, sexually attracted to both males and females (although a strong sexual preference for young females is noted)."

At trial, Hupka reiterated his conclusion that defendant "suffers from pedophilia." He based this conclusion on defendant's behavioral history, his offense history and the information obtained from the clinical records and interview. He noted specifically that defendant had a long history, dating back over 20 years, of sex offenses against children, and that this behavior has continued unabated and undeterred despite repeated incarcerations.

Hupka also confirmed his conclusion that defendant is likely to reoffend. He based this conclusion on the pattern and duration of defendant's behavior, his established preference for

children in the 8- to 13-year-old range, and the empirical research and statistical measures in which defendant was at greater than 50 percent risk of reoffense. He also confirmed that defendant's lack of insight into his behavior, failure to take responsibility for it, and complete lack of any "realistic prevention relapse plan" contributed to his conclusion defendant was likely to reoffend.

Hupka also utilized the newer Static 99 test shortly before trial, and had the same results as Korpi. That is, defendant's likelihood of reoffense dropped from 73 percent over 10 years to 52 percent over 15 years.

At no time during trial did defendant object to the use of the doctor's evaluations or suggest their diagnoses or conclusions were outdated or stale.

DISCUSSION

I.

Defendant first contends there was insufficient evidence that his prior offenses were "predatory" in nature. This argument misconstrues the requirements of the SVPA.

To civilly commit a defendant under the SVPA, the People must prove beyond a reasonable doubt that: (1) the defendant has been convicted of at least two separate sexually violent offenses; (2) defendant has a "diagnosed mental disorder;" (3) and that defendant's disorder makes it likely he will engage in sexually violent behavior if released. (§ 6600, subd. (a)(1); *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1144-1145; *People v. Poe* (1999) 74 Cal.App.4th 826, 830.) The

prosecution is not required to prove that the predicate sexually violent offenses were predatory in nature. (*People v. Torres* (2001) 25 Cal.4th 680, 684, 687.)

A sexually violent offense is defined by the SVPA as including substantial sexual conduct with a child under the age of 14. (§ 6600.1, subd. (a).) Substantial sexual conduct includes digital penetration. (§ 6600.1, subd. (b).) Defendant's record reveals repeated convictions involving substantial sexual conduct with children under the age of 14. Defendant does not challenge this evidence. Accordingly, the People met their burden of proving defendant had been convicted of at least two separate sexually violent offenses.

II.

Defendant also contends the People did not meet their burden of establishing that he was "currently likely to reoffend." (Capitalzation omitted.) He premises this contention solely on the lapse of time between the evaluations of Drs. Hupka and Korpi and the trial.

Defendant was examined by Dr. Korpi in March of 1998 and by Dr. Hupka in April of 1998. His commitment trial took place in May of 2000. Defendant was in custody in the Butte County Jail during that two-year period, thus, he was not receiving any treatment.

Defendant did not object to the admission of the psychological evaluations. Nor did he object to the doctors' testimony at trial. Defendant did not, and does not now, challenge the sufficiency of the evidence that he suffers from a

diagnosed mental disorder. Rather, his challenge, made for the first time on appeal, is that the evidence that he is likely to engage in sexually violent criminal behavior if released was insufficient because the doctors' evaluations were conducted two years before trial.

On appeal, where a defendant challenges the sufficiency of the evidence, we "must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be '"of ponderable legal significance . . . reasonable in nature, credible and of solid value. [Citation.]"'" (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) "The credibility of the experts and their conclusions were matters resolved against defendant by the [judge]. We are not free to reweigh or reinterpret the evidence. [Citation.] Moreover, we must draw all reasonable inferences in favor of the judgment. [Citation.]" (*Id.* at pp. 466-467.)

Drs. Korpi and Hupka's written evaluations were not the only evidence of defendant's current mental disorder and the likelihood he would reoffend. The doctors also testified at the commitment trial. Both doctors testified in the present tense regarding defendant's mental disorder and the likelihood he would reoffend if released, that is his dangerousness. "A mental health professional's opinion on an individual's dangerousness 'includes a significant contemporary component. It speaks . . . to the *present* proclivities of the individual;

it says that he is *at this moment* fully *capable* of conduct dangerous to the health and safety of others. . . .'" (*People v. Bennett* (1982) 131 Cal.App.3d 488, 497, quoting *People v. Henderson* (1980) 107 Cal.App.3d 475, 484, second italics added.)

In addition, both witnesses based their diagnoses of defendant's mental disorder and likelihood of reoffense on objective behavioral criteria the integrity of which is unaffected by the challenged lapse of time. Particularly because, unlike the cases on which defendant relies, in this case defendant received no treatment between the doctors' evaluations and the time of trial.

Dr. Korpi testified that based on the quality and nature of defendant's acts, including that he had both male and female victims, unsuccessful treatment attempts, behavioral recidivism and defendant's denial of a problem, defendant is likely to reoffend. Likewise, Dr. Hupka testified defendant is likely to reoffend based on the pattern and duration of his behavior, his established preference for children under 14, the empirical research and statistical analysis putting defendant at a greater than 50 percent risk of reoffense, defendant's lack of insight into and failure to take responsibility for his behavior, and the lack of any "realistic prevention relapse plan."

"Given certain facts, predictions of future dangerousness may be rationally projected and the drawing of such an inference is properly within the expertise of [] qualified mental health expert[s] like Dr[s]. [Korpi and Hupka]." (*People v. Mapp* (1983) 150 Cal.App.3d 346, 352.) Such facts may include the

refusal to participate in treatment and denial of one's mental illness. (See *id.,* at pp. 351-352.)

Despite the passage of time between the doctors' clinical interviews of defendant and the time of trial, the judge found credible their opinions that defendant has a "diagnosed mental disorder" which made it likely he will engage in sexually violent criminal behavior if released. There was substantial evidence supporting this determination.

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

BLEASE, Acting P.J.

DAVIS, J.